

April 16, 2015

Via Electronic and Regular Mail

Thomas C. Nash
Associate Regional Counsel
U.S. Environmental Protection Agency
77 West Jackson Boulevard (C-14J)
Chicago, IL 60604-3590

RE: South Dayton Dump and Landfill CERCLA Site (Moraine, Ohio)
Institutional Controls - Environmental Covenant

Dear Tom:

On November 12, 2013, I submitted a draft environmental covenant ("EC") to you on behalf of Kelsey Hayes Company, Hobart Corporation, and NCR Corporation for your consideration in connection with the South Dayton Dump and Landfill Site ("Site") (copy attached). The EC was (and is) consistent with Ohio EPA's template as well as the EC that has been recorded with respect to the Miami County Incinerator CERCLA Site, a USEPA-led site located approximately 25 miles north of the South Dayton Dump and Landfill Site in Troy, Ohio. We continue to believe that the EC institutional control is a vital component of the ultimate Site remedy and, as discussed below, it is entirely appropriate to implement the EC at this point in the Site investigation and cleanup proceedings.

Kelsey Hayes, Hobart, and NCR have been conducting an RI/FS at the Site pursuant to an August 15, 2006 Administrative Settlement Agreement and Order on Consent, and a vapor intrusion removal action pursuant to an April 8, 2013 ASAOC. The parties submitted a Good Faith Offer Letter in response to EPA's January 16, 2015 Special Notice Letter that requested performance of a new RI/FS in connection with portions of the Site designated as Operable Unit 1 and Operable Unit 2. Implementing an institutional control such as an EC that eliminates contaminant exposure pathways during this stage of the Site investigation and cleanup is consistent with the letter as well as the spirit of EPA's National Contingency Plan:

"Institutional controls may be used during the conduct of the remedial investigation/feasibility study (RI/FS) and implementation of the remedial action and, where necessary, as a component of the completed remedy." 40 CFR § 300.430(a)(iii)(D).

Thus, it is neither necessary nor, in many circumstances, appropriate to defer implementing institutional controls such as an EC until the ultimate remedy is selected. In its policies and guidance documents, EPA advocates timely adoption of institutional controls such as environmental covenants. See, most recently, "Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional

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Controls at Contaminated Sites” (OSWER 9355.0-8a EPA-540-R-09-001 December 2012) (“2012 Guide”).

As the 2012 guide instructs, “A preliminary IC evaluation typically should be included as part of site investigation efforts. These may include, for example, during an RI/FS developed for CERCLA remedial action.” 2012 Guide, at p. 8. EPA’s guidance further notes that “Full life-cycle planning of I.C.’s is recommended to ensure their long-term effectiveness. Planning for ICs should begin early and be an on-going process.” 2012 Guide, at p. 7.

Consistent with the NCP, an institutional controls-only remedy may be appropriate under certain circumstances (where, for example, active response measures are determined to be not practicable). 2012 Guide, at p. 4. While the ultimate Site remedy remains to be selected, that remedy will likely include a cap on at least portions of the former landfill area, leaving certain contaminants in place. EPA instructs that “If any cleanup alternative being evaluated leaves residual contamination in place, IC’s should be considered to ensure that unacceptable risk from residual contamination does not occur.” 2012 Guide, at p. 3. Adopting the proposed EC will eliminate exposure pathways through its land use restriction and prohibition on use of groundwater. Doing so now, as part of the current RI/FS and vapor intrusion mitigation action, establishes significant health and safety safeguards and establishes a strong framework for the selection of the final Site remedy.

EPA acknowledges that institutional controls may be employed as a component of a site “response.” 2012 Guide at p. 13. It is important to note that the term “respond” or “response” includes remove, removal, and/or remedy or remedial action. 40 CFR § 300.5. In turn, “remove” or “removal” includes:

“the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare of the U.S. or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access...” 40 CFR § 300.5.

Clearly an institutional control such as an EC that precludes use of groundwater and restricts land usage prevents, minimizes, or mitigates damage to the public health and thus is included within the universe of “removal” actions and measures.

Earlier Agency guidance similarly emphasized the ICs are “vital elements of ‘response’ alternatives” because they simultaneously influence and supplement the physical component of the ultimate remedy to be implemented. See, “Institutional Controls: A Site Manager’s Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups” OSWER 9355.0-74FS-P EPA 540-F-00-005 September 2000, at p. 2.

Ohio enacted a statute conforming to the Uniform Environmental Covenants Act (Ohio Revised Code Chapter 5301). Ohio’s template (and our proposed EC) meets the key elements USEPA has identified for a “proprietary control” such as a restrictive covenant (2012 Guide, at p. 22). The proposed EC specifies:

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- The legal authority for the proprietary control;
- A detailed legal description of the site, including a clear description of the area to be restricted;
- A list of land and resource uses that will be restricted;
- A description of who will execute the document;
- The precise names of the parties involved (including the grantee and grantor as they appear on title documents, and any third-party beneficiaries);
- Provisions for third-party or other enforcement, as necessary;
- The parties' rights and obligations in the document;
- Language of intent to clearly express whether the EC is binding on subsequent purchasers (i.e., that the proprietary control "runs with the land");
- Specific notice and approval requirements for modifying or terminating the IC; and
- A requirement to notify all parties involved prior to transfer or lease, or if there is a violation of the terms of the EC.

We respectfully request that USEPA approve of the proposed EC. Upon receipt of such approval, the parties will proceed with adoption and recordation of the institutional control. We would, of course, be glad to discuss this with you at your earliest convenience.

Thank you.

Very truly yours,



Wray Blattner

cc: Ms. Leslie Patterson, USEPA (via email)
Ms. Madelyn Smith, Ohio EPA (via email)
Larry Silver (via email)

Blattner, Wray

From: Blattner, Wray
Sent: Tuesday, November 12, 2013 11:16 AM
To: nash.thomas@epamail.epa.gov; patterson.leslie@epamail.epa.gov;
maddie.smith@epa.state.oh.us; madelyn.smith@epa.state.oh.us
Cc: Larry Silver (lsilver@lssh-law.com)
Subject: South Dayton Dump & Landfill CERCLA Site: Draft Environmental Covenant
Attachments: Environmental Covenant - v1.DOCX

Mr. Nash, Ms Patterson, and Ms Smith:

On behalf of NCR Corporation, Kelsey Hayes Company, and Hobart Corporation, I submit for your review and comment the attached draft Environmental Covenant which we believe would be appropriate for the "South Dayton Dump & Landfill" Site in Moraine, Ohio. The EC is consistent with Ohio EPA's current template as well as the EC that has been recorded with respect to the Miami County Incinerator CERCLA Site (which is located approximately 25 miles north of the South Dayton Dump & Landfill Site in Troy Ohio).

We will, of course, require the cooperation of the owners of the various properties located within the footprint of the SDDL Site and have initiated the process of seeking that cooperation.

Please review the draft EC and provide us with your comments, questions, and/or suggestions.

Thank you.

Wray Blattner
Thompson Hine LLP
Attorneys for NCR Corporation
wray.blattner@thompsonhine.com
(937) 443-6539

THOMPSON
HINE

**ENVIRONMENTAL COVENANT
SOUTH DAYTON DUMP AND LANDFILL SITE**

This Environmental Covenant is made as of the _____ day of _____, 2013, by _____, as Owner and Holder, pursuant to Ohio Revised Code (“ORC”) §§ 5301.80 to 5301.92 for the purpose of subjecting property located within the South Dayton Dump and Landfill Site (hereinafter, the “Site”) (further described below) to the activity and use limitations and to the rights of access described below.

Whereas, the Site contains a former commercial and industrial landfill at which were disposed various hazardous substances; and

Whereas, several private parties agreed to conduct studies and evaluate cleanup options at the Site under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9600 et seq., pursuant to an August 10, 2006 Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study (“ASAOC for RI/FS”) with the United States Environmental Protection Agency (“U.S. EPA”); and

Whereas, the same private parties agreed to conduct sub-surface gas sampling and, as determined to be necessary and appropriate, design and install vapor abatement mitigation systems in structures impacted by subsurface gas migration, and, as determined to be necessary and appropriate, design and implement a landfill gas extraction system, all under an April 5, 2013 Administrative Settlement Agreement and Order on Consent for Removal Action (“ASAOC for Removal Action”); and

Whereas, approximately 40 acres of the former landfill at the Site have been built over and/or are being used for other commercial and/or industrial purposes; and

Whereas, the Site is comprised of numerous property parcels owned by various separate persons and/or entities; and

Whereas, work continues at the Site under the ASAOC for RI/FS and ASAOC for Removal Action; and

Whereas, the Owner and Holder has agreed: (1) to grant a permanent right of access over the Property to the Access Grantees for purposes of implementing, facilitating and monitoring the RI/FS and remedial action as may be selected in a Record of Decision (“ROD”) issued by U.S. EPA; and (2) to impose on the Property activity and use limitations as covenants that will run with the land for the purpose of protecting human health and the environment;

Now therefore, Owner agrees to the following:

Definitions

1. Access Grantees. The United States Environmental Protection Agency ("U.S. EPA"), the Ohio Environmental Protection Agency ("Ohio EPA"), the private parties who signed the ASAOC's and their agents.
 2. Agency. The United States Environmental Protection Agency, within the meaning of Ohio Revised Code 5301.80(B).
 3. Amendment. Any change to this Environmental Covenant, including the Activity and Use Limitations set forth herein, or the elimination of one or more Activity and Use Limitation when there is at least one limitation remaining.
 4. Holder. Owner is the Holder of this Environmental Covenant.
 5. Owner. The Owner of the Property is _____.
 6. Property. The Property is located on real property parcels numbered _____ and located on _____ Road in the City of Moraine in Montgomery County, Ohio and more particularly described in Exhibit A attached hereto and hereby incorporated by reference.
 7. Site. The Site consists of the property parcels located at 1901 through 2153 Dryden Road and 2225 East River Road in Moraine, Ohio and as described in Exhibit B to this Environmental Covenant.
 8. Termination. The elimination of all Activity and Use Limitations set forth herein and all other obligations under this Environmental Covenant.
 9. Transferee. Any future owner or any interest in the Property or any portion thereof, including, but not limited to, owners of an interest in fee simple, mortgages, easement holders, and/or lessees.
1. Environmental Covenant.

This instrument is an Environmental Covenant executed and delivered pursuant to §§ 5301.80 to 5301.92 of the Ohio Revised Code.

2. Activity and Use Limitations.

A. Owner and Transferee(s) agree for themselves and their successors in title not to permit the Property to be used in any manner that would interfere with or adversely affect the conduct of the RI/FS or the integrity or protectiveness of remedial action, which has been implemented or which may be implemented unless the written consent of the U.S. EPA to such use is first obtained. In the event Owner or Transferee intends to excavate or otherwise engage in activity that may disturb soils at the Property, Owner or Transferee shall submit to U.S. EPA

for approval a soil management plan. Owner or Transferee shall not commence the excavation or other activity that may disturb soils until such soil management plan is approved. Owner or Transferee shall comply with the terms of the soil management plan.

B. Owner or Transferee shall be solely responsible for installing vapor intrusion mitigation systems as necessary and/or appropriate in any buildings or other structures constructed or modified on the Property after the recording of this Environmental Covenant.

C. The Property is hereby limited to commercial or industrial land use only, as defined in OAC 3745-300-08(C)(2)(c)(ii) and (C)(2)(c)(iii).

D. Groundwater underlying the Property shall not be extracted or used for any purpose, potable or otherwise, except for investigation, monitoring or remediation of the groundwater or, subject to prior notice to, and any conditions imposed by, U.S. EPA, in conjunction with construction or excavation activities or maintenance of subsurface utilities.

If any event or action by or on behalf of an Owner or Transferee constitutes a breach of the Activity and Use Limitations, Owner or Transferee shall notify Ohio EPA and U.S. EPA within 30 days of becoming aware of the event or action, and shall remedy said breach within 60 days of becoming aware of the event or action, or within such other timeframe as may be agreed to by the Owner or Transferee and Ohio EPA and U.S. EPA.

3. Running with the Land

This Environmental Covenant shall be binding upon the Owner and all assigns and successors in interest, including any Transferee, and shall run with the land, pursuant to ORC § 5301.85, subject to Amendment or Termination as set forth herein.

4. Compliance Enforcement

Compliance with this Environmental Covenant may be enforced pursuant to ORC § 5301.91. Failure to timely enforce compliance with this Environmental Covenant or the activity and use limitations contained herein by any party shall not bar subsequent enforcement by such party and shall not be deemed a waiver of the party's right to take action to enforce any non-compliance. Nothing in this Environmental Covenant shall restrict the Director of Ohio EPA from exercising any authority under applicable law.

5. Access

Owner and Transferee(s) hereby grant to the Access Grantees the right of access to the Property for implementation or enforcement of this Environmental Covenant and to oversee or undertake any activity required by the ASAOC for RI/FS, ASAOC for Removal Action, and/or subsequent Order or Consent Decree. The access rights do not limit any statutory authority of the Ohio EPA or the U.S. EPA nor do they provide any rights against those agencies.

6. Administrative Record

A. Certified copies of the ASAOC for RI/FS and ASAOC for Remedial Action have been recorded with respect to the Property in the Office of the Montgomery County Records Miscellaneous Book 25, Pages 268-324. The ASAOC's constitute environmental response projects as defined by ORC § 5301.80(E) and authorize and require certain investigation and action to be taken by the signatory private parties.

B. Copies of the U.S. EPA administrative record for the Site are maintained at the following locations: U.S. EPA Region 5, Superfund Records Center (7th Floor), 77 W. Jackson, Chicago, Illinois 60604; _____ Library, _____, _____, Ohio _____.

7. Notice upon Conveyance

A. Not later than 10 days prior to any proposed conveyance of any part of the Property, Owner and any subsequent Transferee shall provide the proposed transferee(s) with a copy of this Environmental Covenant.

B. Each instrument hereafter conveying any interest in the Property or any portion of the Property shall contain a notice of the activity and use limitations and grants of access set forth in this Environmental Covenant and provide the recorded location of this Environmental Covenant.

C. Owner, Holder, and Transferee shall notify U.S. EPA and Ohio EPA within ten (10) days after each conveyance of an interest in any portion of the Property. The notice shall include the name, address, and telephone number of the Transferee, a copy of the deed or other documentation evidencing the conveyance, a legal description of the property being transferred, a survey map of the property being transferred; and the closing date of the transfer of ownership of the Property.

8. Representations and Warranties of Owner

Owner represents and warrants:

A. That Owner is the sole owner of the Property;

B. That Owner holds fee simple title to the Property which is free, clear and unencumbered except for _____;

C. That Owner has the power and authority to make and enter into this Agreement as Owner and Holder, to grant the rights and privileges herein provided and to carry out all obligations hereunder;

D. That the Owner has identified all other persons that own an interest in or hold an encumbrance on the Property and notified such persons of the Owner's intention to enter into this Environmental Covenant;

E. That this Environmental Covenant will not materially violate or contravene or constitute a material default under any other agreement, document or instrument to which Owner is a party or by which Owner may be bound or affected.

9. Rights and Remedies

A. Compliance with this Environmental Covenant may be enforced pursuant to ORC 5301.91 or other applicable law.

B. In the event that Owner or Transferee(s) violates the terms of this Environmental Covenant, then, in addition to any rights which U.S. EPA may have under the ASAO for RI/FS, ASAO for Removal Action, or subsequent Order or Consent Decree, U.S. EPA shall have the right to immediately seek an appropriate equitable remedy. Owner and Transferee(s) waive all due process or other constitutional right to notice and hearing or the posting of bond by U.S. EPA before the grant of a temporary restraining order, preliminary injunction and/or other remedy pursuant to this Subsection 9(B).

C. All of the rights and remedies set forth in this Environmental Covenant or otherwise available at law or in equity are cumulative and may be exercised without regard to the adequacy of, or exclusion of, any other right, remedy or option available hereunder or under the ASAO for RI/FS, ASAO for Removal Action, or subsequent Order or Consent Decree or at law. The failure to exercise any right granted hereunder, to take action to remedy any violation by Owner of the terms hereof or to exercise any remedy provided herein shall not be deemed to be a waiver of any such right or remedy and no forbearance on the part of U.S. EPA and no extension of time for performance of any obligations of Owner hereunder shall operate to release or in any manner affect U.S. EPA's rights hereunder.

D. No action or decision by U.S. EPA related to environmental remediation at the Site shall independently give rise to judicial review under this Environmental Covenant. Nothing in this Environmental Covenant shall restrict the U.S. EPA from exercising any authority it may have under applicable law. U.S. EPA reserves all of its statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable.

E. U.S. EPA does not assume any obligations under this Environmental Covenant. U.S. EPA's signature to this Environmental Covenant does not constitute a commitment, contract or obligation for future action on the part of U.S. EPA.

F. Nothing in this Environmental Covenant shall restrict the Ohio EPA or U.S. EPA from exercising any authority under applicable law.

10. Future Cooperation; Execution of Supplemental Instruments

Owner and Transferee(s) agree to cooperate fully with U.S. EPA and Ohio EPA and to assist them in implementing the rights granted them under this Environmental Covenant and, in furtherance thereof, agree to execute and deliver such further documents as may be requested by U.S. EPA and Ohio EPA to supplement or confirm the rights granted hereunder.

11. Amendment or Termination

A. This Environmental Covenant may be modified, amended or terminated only by a written instrument signed by Owner or Transferee (as the case may be), U.S. EPA, and Ohio EPA pursuant to ORC 5301.90 and other applicable law. Upon transfer of all or any portion of the Property, Owner waives any rights that they might otherwise have under ORC Section 5301.90 to withhold consent to any amendments, modifications, or termination of this Environmental Covenant, to the extent that they have transferred their interest in that portion of the Site affected by said modification, amendment or termination.

B. Within thirty (30) days of signature by all requisite parties on any Amendment or Termination of this Environmental Covenant, the Owner or Transferee(s) shall file such instruments for recording with the Montgomery County Recorder's Office, in the same manner as a deed to the Property and shall provide a file- and date-stamped copy of the recorded instrument to the U.S. EPA and Ohio EPA as set forth in Paragraph 17 of this Environmental Covenant.

12. Severability

If any provision of this Environmental Covenant is found to be unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

13. Governing Law

Except as provided herein, this Environmental Covenant shall be governed by and interpreted in accordance with the laws of the State of Ohio. Federal law shall govern issues related to environmental remediation; the adequacy of the institutional controls to protect human health and the environment; and issues involving or relating to the U.S. EPA.

14. Recordation

Within thirty (30) days after date of the final required signature upon this Environmental Covenant, Owner shall file this Environmental Covenant for recording, in the same manner as a deed to the Property, with the Montgomery County Recorder's Office.

15. Effective Date

The effective date of this Environmental Covenant shall be the date upon which the fully executed Environmental Covenant has been recorded as a deed record for the Property with the Montgomery County Recorder.

16. Distribution of Environmental Covenant

Within thirty (30) days after recordation, Owner shall distribute a file- and date-stamped copy of the recorded Environmental Covenant to U.S. EPA and the Ohio EPA at the address set forth in Paragraph 17 of this Environmental Covenant. In addition, Owner shall deliver a copy to the City of Moraine.

17. Notices

Unless notified otherwise in writing, all other notices, requests, demands or other communications required or permitted under this Environmental Covenant shall be given to the U.S. EPA and Ohio EPA at the following addresses:

A. U.S. EPA

Director of Superfund Division
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

B. Ohio EPA

Division of Emergency and Remedial Response
Ohio Environmental Protection Agency
Southwest District Office
401 East Fifth Street
Dayton, OH 45402

18. Compliance

On an annual basis, Owner and any Transferee shall submit to U.S. EPA and Ohio EPA written documentation verifying that the activity and use limitations remain in place and are being complied with.

The undersigned representatives of Owner represents and certifies that he/she is authorized to execute this Environmental Covenant.

IT IS SO AGREED:

Signature of Owner

Date

Printed Name

STATE OF OHIO)
) ss:
COUNTY OF _____)

Before me, a notary public, in and for said county and state, personally appeared _____, a duly authorized representative of _____, who acknowledged to me that he/she did execute the foregoing instrument on behalf of _____.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this _____ day of _____, 2013.

Notary Public

758346.1

EXHIBIT A

PROPERTY DESCRIPTION

EXHIBIT B

SITE DESCRIPTION